

NO. 36728-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL POQUETTE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Roger Bennett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Late amendment of the information prejudiced appellant's right to a fair trial.

Issue pertaining to assignment of error

On the day of trial, the court permitted the state to amend the information, adding an allegation based on facts available to the state since the original information was filed. Where the state's inexcusable delay in amending the information forced appellant to choose between his right to a speedy trial and his right to effective representation, did the amendment deny appellant a fair trial?

B. STATEMENT OF THE CASE

On March 5, 2007, the Clark County Prosecuting Attorney charged appellant Michael Poquette with first degree robbery, alleging that he was armed with a deadly weapon or displayed what appeared to be a deadly weapon, identified as a knife. CP 1-2; RCW 9A.56.200(1)(a)(i); RCW 9A.56.200(1)(a)(ii). Poquette was arraigned on this charge on June 1, 2007, and he was held in custody pending trial. Supp. CP (Journal of Criminal Minute Entries 06/01/2007). The information was amended on July 10, 2007, adding an allegation that Poquette was armed with a deadly weapon, a knife, when he committed the charged offense. CP 8-9.

A jury trial commenced before the Honorable Roger Bennett on Monday, July 30, 2007, with only one day remaining in the speedy trial period. Supp. CP (Scheduling Order, 07/1/2007). At that time, the state moved to amend the information to allege that Poquette committed the offense with a knife and/or a vehicle. 1RP¹ 4. The prosecutor explained that the amendment was necessary because only one of the witnesses could testify to seeing a knife, while both would say Poquette threatened them with a vehicle. 1RP 7. He admitted, however, that the amendment was not based on new information, as the vehicle was referenced in the police report. 1RP 7.

Defense counsel objected to the proposed amendment. 1RP 4-5. He explained that he was not notified of the state's plan to amend the information until the previous Friday, after witness interviews had been conducted, and he would be disadvantaged in his ability to cross examine the witnesses about whether a vehicle was used. 1RP 5. When the court asked what additional work counsel would need to do to be prepared to defend on the vehicle allegation, counsel stated he would have his investigator further question the witnesses regarding specific statements about the vehicle. 1RP 8. He explained that, although the vehicle was

¹ The Verbatim Report of Proceedings from the jury trial is contained in two consecutively paginated volumes designated 1RP (7/30/2007) and 2RP (7/31/2007). The Verbatim Report of Proceedings from the sentencing hearing is designated 3RP (8/3/2007).

discussed to some extent during the witness interviews, that was not the focus of the investigation, since the state had not alleged the use of a vehicle as a means of committing the offense. 1RP 8.

The court found that the vehicle theory was not a surprise to the defense, since it was disclosed on Friday, and it allowed the amendment. 1RP 9; CP 10-11.

At trial, the state presented testimony from Derek Noble and Kristen Ellis, security guards at a Target store, who stated they observed Poquette conceal two CDs in his pocket and leave the store without paying for them. 1RP 20, 22, 51-52. When Ellis confronted Poquette, identifying herself as store security, Poquette pushed her out of the way. 1RP 23-24. Noble then grabbed Poquette, and they wrestled their way outside. 1RP 25. Noble's arm was nicked by what he believed was a set of keys, although Ellis testified she clearly saw a knife in Poquette's hands. 1RP 26, 54. Both Ellis and Noble testified that they followed Poquette into the parking lot until he said he would run them over. 1RP 29, 58. Poquette then got in his truck and drove away, making no attempt to hit either Noble or Ellis. 1RP 30, 44.

In closing argument, the state acknowledged the inconsistent testimony regarding whether Poquette had a knife but told the jury it could

convict Poquette in any event, based on testimony that he threatened Noble and Ellis with his truck. 1RP 86-87, 90-91.

Defense counsel argued that the state failed to prove the charged offense beyond a reasonable doubt, given that the witnesses' stories conflicted and that there was no corroborating evidence that anything was stolen. 1RP 96-99. Counsel argued that the evidence did not establish that Poquette had a knife, or if there was a knife that it constituted a deadly weapon. 1RP 96-97. Defense counsel made no argument regarding the state's allegation that Poquette used his vehicle as a deadly weapon.

The jury was instructed that it could find Poquette guilty of first degree robbery if he was armed with or displayed any deadly weapon, including a vehicle. CP 20, 22. It had to find specifically that Poquette was armed with a knife in order to answer the deadly weapon special verdict in the affirmative, however. CP 28. The jury returned a guilty verdict but found the state had not proven Poquette was armed with a deadly weapon as required for the special verdict. CP 29-30.

The court imposed a standard range sentence, and Poquette filed this timely appeal. CP 37, 50.

C. ARGUMENT

BY ALLOWING THE STATE TO AMEND THE INFORMATION ON THE DAY OF TRIAL, THE COURT IMPERMISSIBLY FORCED POQUETTE TO CHOOSE BETWEEN HIS RIGHTS TO EFFECTIVE REPRESENTATION AND A SPEEDY TRIAL.

Although the trial court may generally permit the state to amend the information any time before a verdict, amendment is not allowed where it will prejudice the substantial rights of the defendant. CrR 2.1(d). An inexcusable delay by the state in amending an information prejudices the defense where the late amendment forces the defendant to choose between the right to a speedy trial and the right to effective assistance of counsel. State v. Michielli, 132 Wn.2d 229, 244-45, 937 P.2d 587 (1997); State v. Earl, 97 Wn. App. 408, 410-11, 984 P.2d 427 (1999).

The state's delay in amending the information is inexcusable where the state fails to use due diligence in bringing additional charges. Earl, 97 Wn. App. at 411. In Earl, the state moved to amend the information on the day of trial to add a second charge. Because the new charge was based on the same information the state had when it filed the original charge, however, there was no excuse for the state's delay in amending the information. Id. Similarly, in Michielli, the defendant was originally charged with one count of theft, and the state sought to add four more charges three business days before trial was to begin. Because the

additional charges were based on information contained in the original affidavit of probable cause, the state's delay in amending the information constituted government misconduct. Michielli, 132 Wn.2d at 243-45.

Here, as in Earl and Michielli, the state's delay in amending the information was inexcusable. The original information was filed on March 5, 2007, and an amended information was filed on July 10, 2007. The prosecutor waited until the day of trial, July 30, 2007, to add the allegation that Poquette used a vehicle as a deadly weapon, even though that allegation was admittedly based on statements contained in the police report. 1RP 7. The state cannot seriously contest the conclusion that it failed to act with due diligence.

Moreover, the state's late amendment of the information prejudiced Poquette's substantial rights. In Michielli, the Supreme Court held that the defendant was prejudiced by the state's inexcusable delay in amending the information. By adding four new charges just before the scheduled trial date without any justification for the delay, the state forced the defendant to either go to trial unprepared or waive his right to a speedy trial. Michielli, 132 Wn.2d at 245.

Poquette suffered the same prejudice. Prior to trial, Poquette's attorney had prepared to defend allegations that Poquette committed robbery while he was either armed with or displayed a knife, and the

state's witnesses were interviewed with those allegations in mind. Then, the last business day before trial was to begin, after witness interviews had been conducted, the state informed counsel it intended to amend the information to allege that Poquette used a vehicle as a deadly weapon. 1RP 5, 8.

When the prosecutor moved to amend the information on the day of trial, defense counsel explained to the court that he was unprepared to defend the new allegation. 1RP 4-5. He would at least need to re-interview the witnesses before he could conduct cross examination or argue any issues regarding the vehicle allegation. 1RP 8. Commenting that the vehicle theory was not a surprise to the defense, at least since Friday, the court permitted the state to amend the information. 1RP 9.

Under the circumstances, however, the late amendment of the information placed Poquette in an untenable position. Because trial was commencing on the last day of the speedy trial period, the state's inexcusable delay in amending the information presented Poquette with a Hobson's choice: he was forced to sacrifice either his right to a speedy trial or his right to be represented by counsel who had had adequate opportunity to prepare his defense. See State v. Sherman, 59 Wn. App. 763, 769, 801 P.2d 274 (1990). A defendant should not be "asked to

choose between two constitutional rights in order to accommodate the State's lack of diligence.” Sherman, 59 Wn. App. at 770.

A situation where a defendant may be forced to waive his speedy trial rights is not a trivial event. Michielli, 132 Wn.2d at 245. Because it prejudiced Poquette’s substantial rights, the court below abused its discretion in allowing the late amendment of the information. C.f. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982) (Court did not abuse discretion in permitting state to amend information on first day of trial, changing charge from assault with intent to commit felony to assault with weapon, where principle element in charge remained the same and no other prejudice demonstrated).

Where the state’s lack of due diligence in bringing charges prejudices the defendant’s right to a fair trial, the court is authorized to dismiss the charges. CrR 8.3(b); Michielli, 132 Wn.2d at 239-40. Poquette’s right to a fair trial was prejudiced by the state’s delay in amending the information, and the charge against him should be dismissed.

D. CONCLUSION

The state’s inexcusable delay in amending the information prejudiced Poquette by forcing him to choose between constitutional rights, and the charge against him should be dismissed.

DATED this 31st day of December, 2007.

Respectfully submitted,

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